

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

SUSAN CHASE, Special Personal  
Representative of the Estate of  
CHRISTINA MARIE SCHREIBER,  
deceased,

Plaintiff,

vs.

Case No. 2005-407-NS

EMILY MESSINA and PEACOCK'S  
INC., a Michigan corporation, d/b/a  
ROGER'S ROOST,

Defendants.

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OPINION AND ORDER

Defendant Peacock, Inc., moves for summary disposition.

This is a wrongful death action. Plaintiff filed her complaint on February 1, 2005. Plaintiff alleges that on January 17, 2005, her decedent, Christina Schreiber, was the passenger in a vehicle driven by defendant Messina, when Messina lost control and crashed, causing injuries to Christina Schreiber leading to her death. Plaintiff alleges the two had been served alcohol at Roger's Roost earlier in the evening. Plaintiff brings claims for negligence against Messina and a dramshop action against Roger's Roost. Defendant Peacock's Inc., d/b/a Roger's Roost, moves for summary disposition.

Defendant Peacock's, Inc., argues, first, that the non-innocent plaintiff doctrine precludes recovery in this case. In this regard, defendant asserts that Messina testified that the decedent asked her to stop at a liquor store on the way to a friend's house earlier in the evening, so that she could buy vodka. Defendant avers the testimony further established that the friend did not



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furnish alcohol to either the decedent or Messina, i.e., the alcohol Messina drank at the friend's house must have been furnished by the decedent. Second, defendant Peacock contends that, as a matter of law, plaintiff's decedent was 50% or more the cause of the accident, and, thus, plaintiff is precluded from recovery against defendants. Here, defendant relies upon case law providing that if a plaintiff chooses to drink and become intoxicated, and chooses to ride with an intoxicated driver, the plaintiff is 50% or more the cause of any accident that occurs and the defendant is entitled to the absolute defense provided by MCL 600.2955a(1).

Plaintiff responds, first, that there are genuine issues of material fact regarding whether plaintiff's decedent supplied defendant Messina with alcohol that Messina consumed. Specifically, plaintiff contends, the testimony is inconsistent on what exactly the decedent purchased at the store, and Messina did not actually see what the purchase was. Second, plaintiff contends that summary disposition is inappropriate as allocation of fault is a question for the jury, and should not be decided by a judge in a motion for summary disposition.

Defendant Peacock moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). A motion brought under MCR 2.116(C)(8) tests the sufficiency of the complaint on the basis of the pleadings alone. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The trial court must grant the defendant's motion if no factual development could justify the asserted claim for relief. *By Lo Oil*, 26. A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. *By Lo Oil*, 26. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil Co*, 26. If the moving party satisfies its burden of production,

the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil Co*, 26-27.

The Court has previously ruled that summary disposition would not be granted based on the "non-innocent plaintiff doctrine." The Court remains persuaded that the testimony is not clear that the decedent provided the alcohol to Messina. Moreover, the testimony was inconsistent. For example, while Messina testified that she stopped at a liquor store to enable the decedent to buy vodka, on the way to going to their friend Matt's house, Matt testified that he recalled the decedent and Messina bringing in 20 oz. sodas, one had what appeared to be 7 Up and the other had a Pepsi. (Tr 9) It is for the jury to decide the credibility of the witnesses.

Second, the Court is persuaded that whether plaintiff's decedent is 50% or more the cause of the accident is a question of fact for the jury. MCL 600.2955a(1) provides:

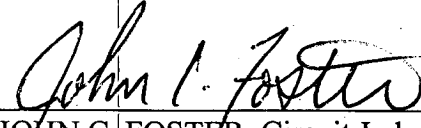
**It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage. (Emphases added.)**

The Michigan Supreme Court recently found that the Court of Appeals and Gogebic Circuit Court "erred in finding, as a matter of law, that as a result of plaintiff's impaired ability to function due to the influence of intoxicating liquor, she was 50% or more the cause of the accident that resulted in her injuries and that she is barred from recovery under MCL 600.2955a(1)." *Mallison v Scribner*, 475 Mich 878; 715 NW2d 72 (June 7, 2006), reversing *Mallison v Scribner*, 269 Mich App 1; 709 NW2d 227 (2005), upon which defendant relies. The Court remanded for further proceedings.

Additionally, prior cases make clear that whether the decedent or injured party is more than 50% the cause of the accident is a question for the jury. See, e.g., *Piccalo v Nix*, 252 Mich App 675, 680; 653 NW2d 447 (2002), in which plaintiff was under the legal drinking age, became intoxicated, freely chose to accept a ride from an intoxicated driver, also chose to ride in the back without proper seating or restraints and chose to ride in a vehicle filled with unrestrained materials including a tire and several tools. The Court advised that this was evidence "from which the jury could conclude that plaintiff was fifty percent, or more, the cause of the 'event' . . . ." *Piccalo*, 680. See also, *Harbour v Correctional Medical Services, Inc.*, 266 Mich App 452, 458; 702 NW2d 671 (2005), "there was evidence from which the jury could conclude that plaintiff was fifty percent, or more, the cause of the 'event' that resulted in the injury." The Court is thus persuaded that whether, as a result of the decedent's alleged impairment, the decedent was 50% or more the cause of the accident, is for the jury.

For the foregoing reasons, defendants Peacock, Inc.'s motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

  
JOHN C. FOSTER, Circuit Judge

Dated: August 8, 2006

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